

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In Reply Refer to:
1800B3-MFW

March 12, 2001

Michael F. Mulpeter, Esq.
Cohn Birnbaum & Shea P.C.
100 Pearl Street
Hartford, CT 06103-4500

John M. Burgett, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

In re: WLFH(AM), Little Falls, NY, Fac. ID 57701
Roser Communications Network, Inc.
File No. BAL-20001120ABG

WOWZ(FM), Whitesboro, NY, Fac. ID 53630
Professional Broadcasting Association
File No. BALH-20001120ABH

WOWB(FM), Little Falls, NY, Fac. ID 67460
Towpath Communications, Inc.
File No. BALH-20001120ABI
Assignment of Licenses

Dear Counsel:

The staff has under consideration: (1) the above captioned applications proposing to assign the licenses of stations WLFH(AM), WOWB(FM), Little Falls, New York and WOWZ(FM), Whitesboro, New York, to Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"); (2) a petition to deny the applications, filed on January 8, 2001 by Galaxy Communications, L.P ("Galaxy");¹ and (3) additional responsive pleadings.² For the reasons set forth below, we deny the petition and grant the applications.

Background. Clear Channel is currently the licensee of four stations licensed to Utica/Rome, New York, the radio metro market at issue in this proceeding,³ as well as six

¹ Galaxy is the licensee of stations WTKW(FM), Bridgeport, New York; WKRL(FM) and WTLA(AM), North Syracuse, New York, and WTKV(FM)/WSGO(AM), Oswego, New York.

² These documents include Clear Channel's January 23, 2001 opposition to the petition and Galaxy's February 2, 2001 reply.

³ These are stations WUTQ(AM), WOUR(FM), Utica, New York; WRNY(AM), WSKS(FM), Rome, New York.

stations licensed to adjacent communities.⁴ While its proposed acquisition of the three stations is consistent with the numerical limits in our radio local ownership rules, 47 C.F.R. §73.3555,⁵ the Commission “flagged” the Public Notice announcing receipt of the applications on the grounds that the proposed transaction might raise concerns about competition and diversity.⁶ Galaxy filed a timely petition to deny the applications, raising competition concerns.

Galaxy states that, if Clear Channel is permitted to acquire WLFH(AM), WOWZ(FM), and WOWB(FM), it will control approximately 28.4% of the radio advertising revenue in the Utica/Rome market; in conjunction with the leading revenue holder in the market, Regent Communications (“Regent”) (which controls 56.5 % of the radio advertising revenue), the top two owners will control approximately 85%. This, states Galaxy, will violate the Commission’s “50/70 policy,”⁷ and will harm advertisers seeking to buy time in the Utica/Rome market. Additionally, Galaxy states that Clear Channel’s acquisition of the three subject stations is inconsistent with antitrust principles in that it would increase the level of concentration to unacceptable levels under what it asserts is the Department of Justice’s primary indicator of market concentration.⁸

⁴ These are Stations WFRM(FM), Remsen, New York; WHEN(AM), WSYR(FM), and WYYY(FM), Syracuse, New York; WGY(AM), Schenectady, New York; and WVOA(FM), DeRuyter, New York. Clear Channel is also the licensee of WADR(AM), Remsen, New York and WWHT(FM), Syracuse, New York, stations whose principal community contours do not overlap with any of the subject stations.

⁵ Clear Channel’s multiple ownership showing indicates that, using the Commission’s current definition of radio market, the transaction creates ten separate markets. *See Notice of Proposed Rule Making, In the Matter of Definition of Radio Markets*, MM Docket No. 00-244, FCC 00-427 (December 13, 2000) (“*Market Definitions*”). Markets 1-4 are each composed of 57 radio stations; a single licensee can therefore own up to 8 commercial stations in that market, not more than 5 of which are in the same service (AM or FM). *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996), §202(b)(1) *codified as* 47 C.F.R. §73.3555(a)(1). Markets 5-8 are each composed of 41 radio stations; a single licensee can own up to 7 commercial stations in that market, not more than 4 of which are in the same service. *Id.* Markets 9 and 10 are each composed of 21 radio stations; a single licensee can own up to 6 commercial stations in that market, not more than 4 of which are in the same service. *Id.*

If the proposed transaction is approved and consummated, Clear Channel will own in market 1, 5 stations (1 AM 4 FM); in market 2, 6 stations (2 AM 4 FM); in market 3, 6 stations (1 AM 5 FM); in market 4, 6 stations (2 AM 4 FM); in market 5, 5 stations (1 AM 4 FM); in market 6, 5 stations (2 AM 3 FM); in market 7, 5 stations (1 AM 4 FM); in market 8, 4 stations (1 AM 3 FM); in market 9, 3 stations (1 AM 2 FM); and in market 10, 3 stations (1 AM 2 FM).

⁶ *Public Notice*, Report No. 24876 (December 7, 2000). In public notices announcing the filing of radio broadcast sales applications, the Commission currently identifies for further competitive review (“flags”) those applications that would result in one entity controlling 50% or more of the advertising revenue in the relevant market or in the top two entities controlling 70% or more of that revenue. *See Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062, 16070 (2000). The language used in such public notices is: “Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission’s obligation under Section 310(d) of the Communications Act, 47 U.S.C. §310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing served the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.”

⁷ *See* note 6, *supra*.

⁸ Galaxy notes that the Department considers a market to be “highly concentrated” if its Herfindahl-Hirschman

Discussion. Our independent analysis indicates that, upon acquisition of the subject stations, Clear Channel would control 28.6 % of the radio advertising revenue in the Utica/Rome market. Clear Channel and Regent will, as Galaxy notes, together control 85% of advertising revenue in the relevant market. Clear Channel's 28.6% post-merger market share is clearly within levels previously approved in other Commission cases. *See New City Communications, Inc.*, 12 FCC Rcd 3929 (1997) (approving transaction that would result in proposed assignee controlling 52.4% of radio advertising revenues in the market). Clear Channel and Regent's combined market share, however, does exceed that approved in any prior Commission case. *See Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062 (2000) (approving transactions in Akron, Ohio and Cedar Rapids, Iowa, where the post-merger advertising revenue share of the top two groups in the market would be 82.6% and 80.8%, respectively). Nonetheless, we do not believe that the higher "top-two" revenue share requires, in the circumstances present here, designation for hearing of the assignment applications under consideration. As we note in *Great Empire*, revenue shares are not alone dispositive. *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145 (1999). Here, other stations in the market represent significant capacity for future competition. Galaxy itself, with two Class B FM stations and one Class B AM station, garners a 15.1% revenue share, and there are, in addition to Galaxy's stations, a Class C FM station, four Class A FM stations, and three Class B AM stations in the market. Moreover, the party gaining revenue share in this transaction is by far the smaller competitor in the market. Finally, Galaxy does not allege facts, nor are we aware of any evidence, that would support the conclusion that Clear Channel and Regent have, or as a result of this transaction, are more likely to, engage in coordinated interaction that would harm competition. *See Id.* at 11150. In light of these facts, we reject Galaxy's argument that the increase in the HHI renders the level of post-transaction market concentration unacceptable and conclude that there is no substantial and material question of fact as to the effect of the proposed assignment on competition and diversity that would warrant further inquiry.⁹

Galaxy raises two other concerns with the instant transaction. First, it states that Clear Channel's multiple ownership showing is inadequate and misleading and fails to demonstrate compliance with the local ownership provisions in 47 C.F.R. §73.3555. Galaxy argues that the showing contains only a single, "confusingly labeled" map depicting the contours of 14 stations not designated by Clear Channel as defining any "market." Galaxy maintains that Clear Channel should be required to provide a revised multiple ownership showing containing a separate map for each market depicting the contours of each station in each market, as well as the worksheets utilized by Clear Channel in certifying compliance with the local radio ownership rules.

Index ("HHI") exceeds 1800, and it presumes that mergers producing an HHI increase of more than 100 points are likely to impermissibly create or enhance market power. According to Galaxy, the post-merger HHI in Utica/Rome would be 4201, and the acquisition would raise the already high HHI by 256 points.

⁹ *See* note 8, *supra*. We note that in any event, the Commission has not afforded HHI the persuasive weight suggested by Galaxy. *See, e.g., Alton Rainbow Corporation (WPYO(FM), Apopka, Florida)*, FCC 99-195, 1999 WL 566130 (rel. Aug. 4, 1999), n. 20; *Great Empire, supra*, 14 FCC Rcd at 11151 (Commission believes that "mechanical application" of HHI and other Horizontal Merger Guidelines may provide misleading answers to competitive issues in the context of local radio mergers; therefore, Commission applies the standards reasonably and flexibly to specific facts and circumstances).

We reject Galaxy's argument that Clear Channel's multiple ownership showing was in any way inadequate or designed to mislead the agency. While the provision of a separate map for each "market" created by the subject transaction using the Commission's current definition of radio market would have facilitated review, the graphic and textual information supplied by Clear Channel were sufficient for the staff to analyze and corroborate its analysis.

Additionally, Galaxy argues that the Commission's definition of a "radio market" does not comport with economic reality in that it unrealistically increases the size of such "markets" by counting stations which do not actually compete in the Utica/Rome market, including some stations owned by Clear Channel.¹⁰ Thus, states Galaxy, the current market definition rules permit numerous inequalities in ownership. Citing Paragraph 14 of *Market Definitions*, see note 5 *supra*, Galaxy states that the proposed transaction would meet *none* of the market definitions proposed in that document¹¹ and thus, at a minimum, the staff must defer action on the subject applications until the completion of the *Market Definitions* rule making proceeding.

The Commission's recently released *Notice of Proposed Rule Making in Market Definitions* seeks comment specifically on whether and how the Commission should modify the standard for defining radio markets and counting the number of stations in these markets. The rule making also seeks comment on whether and how the Commission should amend the methodology by which it determines the number of radio stations owned by a party in a radio market for purposes of applying the multiple ownership rules. However, in *Market Definitions*, the Commission specifically addressed the effect of the rule making proceeding on pending applications. As a general matter, noted the Commission, "we will continue to process applications under the existing standards, unless and until they are changed in this proceeding. In cases raising concerns about how we count the number of stations a party owns in a market, however, we will defer decision pending resolution of that issue in this proceeding." *Market Definitions*, at ¶ 14. In this case, although Galaxy generally challenges as over-inclusive the Commission's methodology for defining market boundaries, it does not demonstrate that Clear Channel's acquisition here falls into the narrow class of transactions on which the Commission decided to defer action, nor do we conclude that the instant transaction is in that narrow class of cases.

As the Commission explained in *Market Definitions*, it currently evaluates whether a proposed transaction complies with statutory ownership caps¹² by first determining the

¹⁰ For example, Galaxy states that in Markets 1-4, Clear Channel calculates that there are 57 stations in each "market," allowing it to own up to eight stations in each. However, notes Galaxy, 32 of those 57 stations have markets other than Utica/Rome as their home markets, and 15 of those 57 stations are owned by Clear Channel. Because under the current standards only mutually overlapping stations are counted against Clear Channel's local ownership limit, Clear Channel can comply with the standard. See *Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999).

¹¹ Clear Channel disputes this argument, noting that, if the Commission adopts the proposal that it "exclude from the count of the number of stations in a market, any stations owned by the applicant, except the commonly owned stations that form the market," more than enough stations remain in each of the ten markets to permit the proposed common ownership. Clear Channel opposition, at 4-5.

¹² See Section 202(b)(1) of the Telecommunications Act of 1996, establishing four tiers of permissible ownership. Specifically, in a radio market with 45 or more commercial stations, a party may own up to 8 commercial radio stations, not more than 5 of which are in the same service; in a radio market with between 30 and 44 commercial stations, a party may own up to 7 commercial radio stations, not more than 4 of which are in the same service; in a radio market with between 15 and 29 commercial radio stations, a party may own up to 6 commercial radio stations,

boundaries of each market created by the transaction. Specifically, it looks to all stations that will be commonly owned after the proposed transaction is consummated and groups these stations into “markets” based on which stations have mutually overlapping signal contours. It then determines the total number of stations in a market by counting all stations whose principal community contours overlap the principal community contours of *any* one or more of the stations whose contours define the market. *See Market Definitions* at ¶¶ 3-4. Based on our current methodology, a station owned by an applicant might not count as an attributable interest in determining whether the applicant will comply with the numerical ownership cap in a market because it does not overlap all of the stations the applicant seeks to own in that market. Nonetheless, that same station may count for purposes of determining the total number of stations in that market, because it overlaps the contour of at least one station which defines the market. It was anomalous cases – where an applicant’s *own* existing holdings make a dispositive contribution to the total number of stations in the market, thereby “bumping” the applicant into a tier of permissible ownership that it could not otherwise reach – that proved especially troubling in past proceedings.¹³ Likewise, it is these anomalous cases which we believe the Commission intended to hold in abeyance pending the outcome of the rule making. As noted by Clear Channel, even if all of its stations (except those mutually overlapping stations forming the market) were excluded from the number of stations in each market created by the proposed transaction, enough stations remain in each market to permit the proposed common ownership. Accordingly, the proposed transaction does not warrant deferral.

We have examined the subject assignment applications and find that they comport with all statutory and regulatory requirements and that their approval would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, That, the Petition to Deny filed by Galaxy Communications, L.P. IS DENIED, and the applications to assign the licenses of stations WLFH(AM) from Roser Communications Network, Inc. (File No. BAL-20001120ABG), WOWZ(FM) from Professional Broadcasting Association (File No. BALH-20001120ABH), and WOWB(FM) from Towpath Communications, Inc. to Clear Channel Broadcasting Licenses, Inc. ARE GRANTED.

Sincerely,

Linda Blair, Chief
Audio Services Division
Mass Media Bureau

cc: Richard J. Hayes, Esq.

not more than 4 of which are in the same service; and in a radio market with 14 or fewer commercial radio stations, a party may own up to 5 commercial radio stations, not more than 3 of which are in the same service, except that a party may not own more than 50% of the stations in such a market.

¹³ *See Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999) (Commissioners Susan Ness and Gloria Tristani, dissenting.) *See also Market Definitions* at ¶¶ 8-9 (proposing to “exclude from the count” of the number of stations in a market, any stations owned by the applicant, except the commonly owned stations that form the market).